

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TIMOTHY L. FRANKLIN, individually,
and on behalf of all others similarly
situated,

Plaintiff,

vs.

BANK OF AMERICA, N.A. and DOES 1
through 50, inclusive,

Defendant.

CASE NO. C 05 00519 CRB

**~~[PROPOSED]~~ ORDER FOR FINAL
APPROVAL OF CLASS ACTION
SETTLEMENT**

Date: June 16, 2006
Time: 10:00 a.m.
Courtroom: 8, 19th Floor
Judge: Honorable Charles Breyer

This matter came before the Court for hearing on June 16, 2006, at 10:00 a.m. before Judge Charles Breyer, pursuant to the Order: (1) conditionally certifying the Settlement Class; (2) preliminarily approving the proposed settlement; (3) approving notice to the Class, including the claim form and exclusion form; and (4) setting the final approval hearing, entered on December 8, 2005 ("Preliminary Order"), for final approval of the settlement as set forth in the parties' Joint Stipulation Of Settlement And Release Between Plaintiff Timothy Franklin and Defendant Bank of America, N.A. ("Settlement Agreement"). The Court, having entered the Preliminary Order, determined that due and adequate notice has been given to the Settlement Class as required by the

1 Preliminary Order, and having considered all papers filed, the arguments of counsel, the law and
2 otherwise being fully informed, and good cause appearing therefor,

3 IT IS ORDERED, ADJUDGED AND DECREED that:
4

5 1. All terms used in this order granting final approval to the class action settlement
6 ("Final Order") shall have the same meaning as defined in the Settlement Agreement.

7 2. This Court has jurisdiction over the subject matter of the Lawsuit and over all
8 parties, including all Class Members.

9 3. Pursuant to the Preliminary Order, the Court preliminarily certified the following
10 Class for settlement purposes to include the following:

11 **ALL CURRENT AND FORMER EMPLOYEES OF BANK OF AMERICA,**
12 **N.A. ("BANK") WHO WERE EMPLOYED BY THE BANK IN THE STATE**
13 **OF CALIFORNIA AS MORTGAGE RETAIL LENDING ACCOUNT**
14 **EXECUTIVES (JOB CODE SM009) DURING ALL OR PART OF THE**
15 **PERIOD FROM DECEMBER 20, 2000 THROUGH DECEMBER 8, 2005**
WHO DID NOT PARTICIPATE IN THE RAQUIB ABDUALLAH ET AL. V.
BANK OF AMERICA, N.A. ACTION IN MINNESOTA DISTRICT COURT,
CASE NO. 04-2951 JMR/FLN.

16 In certifying the Class, the Court found and still finds that: (1) the members of the Settlement
17 Class are so numerous that joinder of all class members in this action is impracticable; (2) there
18 are questions of law and fact common to the members of the Settlement Class; (3) the questions
19 of law and fact common to the members of the Settlement Class are substantially similar and
20 predominate over any questions affecting only individual members of the Settlement Class; (4)
21 the claims or defenses of the representative Plaintiff are typical of the claims or defenses of the
22 members of the Settlement Class; (5) the representative Plaintiff and his counsel have fairly and
23 adequately protected the interests of the Settlement Class; and (6) a class action is superior to
24 other available methods of fair and efficient adjudication of the controversy, considering, *inter*
25 *alia*, (a) the interests of the members of the Settlement Class in individually controlling the
26 prosecution of separate actions, (b) the extent and nature of any litigation concerning the
27 controversy already commenced by members of the Settlement Class, (c) the desirability or
28 undesirability of prosecuting the litigation of these claims in this particular forum, and (d) the

1 difficulties likely to be encountered in the management of the class actions. Accordingly, the
2 Settlement Class is now finally and conclusively certified for settlement purposes;

3
4 4. In accordance with the Preliminary Order, the parties caused to be mailed the
5 following: (1) Notice of Proposed Class Action Settlement for Unpaid Overtime Premiums; (2)
6 Claim Form; and (3) Exclusion Form (collectively the "Notice Materials"). The Notice Materials
7 were sent via first class mail within the time mandated in the Preliminary Order, and adequately
8 informed the Settlement Class of: (1) the pendency of the proposed settlement; (2) all material
9 elements of the proposed settlement; (3) the June 16, 2006 hearing date for final approval of the
10 settlement; and (4) the opportunity to be excluded from the proposed Settlement Class or
11 otherwise object to the proposed settlement. David C. Holland of Rust Consulting, Inc., the
12 Settlement Administrator, filed a declaration with the Court on May 8, 2006 concerning the
13 dissemination of the Notice Materials and the status of claims and objections.

14 5. The Notice Materials provided due and adequate notice to potential Settlement
15 Class members and constitutes the best notice practicable and possible under the circumstances.
16 The proof of dissemination filed with the Court demonstrates that this Court's orders have been
17 complied with in regard to the Notice Materials and preliminary approval of the settlement, and
18 further, that the best notice practicable and possible under the circumstances was in fact given and
19 constituted valid, due, and sufficient notice to members of the Settlement Class, complying fully
20 with all applicable statutes and laws.

21 6. No Class Member has filed an objection to this settlement.

22 7. The Settlement Administrator received 26 timely exclusion forms.

23 8. The parties' Settlement Agreement is granted final approval, as the Court finds the
24 settlement is, in all respects, fair, reasonable and adequate to the parties and Class Members. The
25 Court orders the parties to effectuate the Settlement Agreement according with its terms. A copy
26 of the Settlement Agreement is attached to this Proposed Final Order as **Exhibit A**.

27 9. Defendant shall pay the claims presented by the claim procedure described in the
28 Settlement Agreement. Given the number of claims submitted, the amount paid will be less than

1 \$9,000,000.00. Defendant shall have no further liability for costs, expenses, interest, attorneys'
 2 fees, or for any other charge, expense, or liability, except as provided in the Settlement
 3 Agreement.

4 10. The Settlement Class is bound by the release and waiver listed in Paragraphs 43
 5 and 45 of the Settlement Agreement, respectively, and this Final Order, which Final Order shall
 6 have the force and effect of *res judicata* as to them.

7 11. By operation of this Final Order and the Settlement Effective Date, Class Members
 8 who did not timely submit Exclusion Forms fully release and discharge the Bank and its former
 9 and present parent, subsidiary, and affiliated corporations and its officers, directors, employees,
 10 partners, shareholders and agents, and any other successors, assigns, or legal representatives
 11 ("Class Members' Released Parties"), from any and all wage-and-hour claims, whether known or
 12 unknown, arising during the period from December 20, 2000 to December 31, 2005 ("Class
 13 Members' Released Period"), whether under federal, state and/or local law, statute, ordinance,
 14 regulation, common law, or other source of law; whether or not such claims are in the nature of
 15 claims for damages, unpaid wages, premium pay, waiting-time penalties, or other penalties for
 16 overtime, missed meal periods, missed rest breaks, and other alleged wage-and-hour violations,
 17 attorneys' fees or injunctive relief; whether sounding in contract or tort; and whether pursuant to a
 18 statutory remedy ("Class Members' Released Claims"). The Class Members' Released Claims
 19 include, but are not limited to, claims arising from or dependent on the California Labor Code;
 20 the wage orders of the California Industrial Welfare Commission; California Business and
 21 Professions Code section 17200 *et seq.*; the California common law of contract and tort; and the
 22 Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*

23 12. The class representative, Timothy Franklin, is bound by the release and waiver
 24 listed in Paragraphs 43, 44 and 45 of the Settlement Agreement, respectively, and this Final
 25 Order, which Final Order shall have the force and effect of *res judicata* as to him.

26 13. By operation of this Final Order and the Settlement Effective Date, the Class
 27 Representative fully and finally releases and discharges the Bank and its former and present
 28 parent, subsidiary, and affiliated corporations and its officers, directors, employees, partners,

1 shareholders and agents, and any other successors, assigns, or legal representatives ("Class
 2 Representative's Released Parties"), from any and all claims, whether known or unknown, arising
 3 during the period from the start of time to December 31, 2005 ("Class Representative's Released
 4 Period"), whether under federal, state and/or local law, statute, ordinance, regulation, common
 5 law, or other source of law; whether or not such claims are in the nature of claims for damages,
 6 unpaid wages, premium pay, waiting-time penalties, or other penalties for overtime, missed meal
 7 periods, missed rest breaks, and other alleged wage-and-hour violations, attorneys' fees or
 8 injunctive relief; whether sounding in contract or tort; and whether pursuant to a statutory remedy
 9 ("Class Representative's Released Claims"). The Class Representative's Released Claims
 10 include, but are not limited to, claims arising from or dependent on the California Labor Code;
 11 the wage orders of the California Industrial Welfare Commission; California Business and
 12 Professions Code section 17200 *et seq.*; the California Fair Employment and Housing Act, Cal.
 13 Gov't Code § 12900 *et seq.*; the California common law of contract and tort; Title VII of the Civil
 14 Rights Act of 1964; the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*; the
 15 Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*; and the Fair Labor
 16 Standards Act, 29 U.S.C. § 201 *et seq.*

17 14. By operation of this Final Order and the Settlement Effective Date, Class Members
 18 who did not timely submit Exclusion Forms waive all rights and benefits afforded by Section
 19 1542 of the Civil Code of the State of California, and do so understanding the significance of that
 20 waiver. Section 1542 provides:

21 "A general release does not extend to claims which the
 22 creditor does not know or suspect to exist in his favor at the
 23 time of executing the release, which if known by him must
 have materially affected his settlement with the debtor."

24 In order to achieve a full and complete release of the Bank of all claims arising from or related to
 25 the lawsuit, each Class Member acknowledges that this Settlement Agreement is intended to
 26 include in its effect all claims regarding the subject matter of the Complaint which were or could
 27 have been asserted in this Lawsuit, including claims which each Class Member does not know or
 28 suspect to exist in his or her favor against the Bank.

1 15. All Class Members who failed to submit a timely Exclusion Form are barred and
2 permanently enjoined from instituting, asserting or prosecuting, directly, representatively,
3 derivatively or in any other capacity, any Released Claims against Defendants.

4 16. The Settlement Agreement is not an admission by the Bank nor is this Final Order
5 a finding of the validity of any claims in the Lawsuit or any wrongdoing by the Bank.
6 Furthermore, neither the Settlement Agreement, nor any document, statement, proceeding or
7 conduct related to the settlement or the Settlement Agreement, nor any reports or accounting of
8 those matters, will be (i) construed as, offered or admitted in evidence as, received as, or deemed
9 to be evidence for any purpose adverse to the Bank, including, but not limited to, evidence of a
10 presumption, concession, indication or admission by the Bank of any liability, fault, wrongdoing,
11 omission, concession or damage; or (ii) disclosed, referred to or offered in evidence against the
12 Bank, in any further proceeding in the Lawsuit, or any other civil, criminal or administrative
13 action or proceeding except for purposes of effectuating the Settlement Agreement. However, the
14 Settlement Agreement may be admitted in evidence and otherwise used in any and all
15 proceedings to enforce any or all terms of the Settlement Agreement, or in defense of any claims
16 released or barred by the Settlement Agreement.

17 17. The claims alleged in the Complaint are hereby dismissed with prejudice,
18 provided, however, and without affecting the finality of this Final Order in any way, this Court
19 retains continuing jurisdiction over: (i) interpretation, implementation and enforcement of this
20 settlement; and (ii) enforcement and administration of the Settlement Agreement.

21 18. The Court finds that the Settlement Agreement was entered into in good faith and
22 constitutes a fair, reasonable and adequate compromise of Plaintiffs' claims against the Bank.

23 19. This litigation (and all claims asserted at any time herein) is hereby fully and
24 finally dismissed with prejudice, with each party to bear his/her/its own costs and attorneys' fees
25 (except as otherwise expressly provided herein).

26 IT IS SO ORDERED.
27
28

July 20, 2006

DATED: May , 2006

By: _____

THE HONORABLE _____

APPROVED AS TO FORM:

DATED: May 8, 2006

PAUL, HASTINGS, JAFFETSKY & WALKER LLP

By: _____

ANNETTE RITTMULLER

Attorneys for Defendant
Bank of America, N.A.

DATED: May 5, 2006

HOFFMAN & LAZEAR

By: _____

ARTHUR LAZEAR

Attorneys for Plaintiff
Timothy L. Franklin

LEGAL: US_W # 7612712.2

[PROPOSED] ORDER FOR FINAL
APPROVAL OF CLASS ACTION
SETTLEMENT

EXHIBIT A

1 M. KIRBY C. WILCOX (SB# 78576)
STEPHEN P. SONNENBERG (SB#164881)
2 ANNETTE GAMMON (SB# 211882)
SAIDAH GRAYSON (SB# 221713)
3 PAUL, HASTINGS, JANOFSKY & WALKER LLP
55 Second Street
4 Twenty-Fourth Floor
San Francisco, CA 94105-3441
5 Telephone: (415) 856-7000
Facsimile: (415) 856-7100

6 Attorneys for Defendant
7 Bank of America, N.A.

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

11 TIMOTHY L. FRANKLIN, individually,
and on behalf of all others similarly
12 situated,

13 Plaintiffs,

14 vs.

15 BANK OF AMERICA, N.A. and DOES 1
through 50, inclusive,

16 Defendants.
17

CASE NO. C 05 00519 CRB

**JOINT STIPULATION OF SETTLEMENT
AND RELEASE BETWEEN PLAINTIFF
TIMOTHY L. FRANKLIN AND
DEFENDANT BANK OF AMERICA, N.A.**

18
19 This Joint Stipulation of Settlement and Release is made and entered into by and
20 between the following parties: Plaintiff Timothy Franklin, individually and on behalf of all others
21 similarly situated, and defendant Bank of America, N.A., by and through their respective counsel
22 of record.

23
24 **I.**
DEFINITIONS

25
26 1. "Action" means the civil action commenced on December 20, 2004 by
27 Plaintiff against the Bank in San Francisco Superior Court entitled, *Timothy Franklin et al, v.*
28 *Bank of America, N.A., et al.*, Case No. CGC 04437258, which the Bank subsequently removed to

JOINT STIPULATION OF SETTLEMENT
AND RELEASE

1 the United States District Court for the Northern District of California, *Timothy Franklin et al.*
2 *Bank of America, N.A.*, Case No. C05 00519 CRB.

3
4 2. "Bank" shall mean Defendant Bank of America, N.A. and all of its
5 officers, directors, agents, attorneys, parents, predecessors, successors, subsidiaries, and related
6 and affiliated entities.

7
8 3. "Claims Administrator" shall mean Rust Consulting Inc., or an
9 administrator mutually agreed to by the Parties that will perform the duties of (i) using the data
10 provided by the Bank to prepare the Claim Forms with the number of Weeks Worked in the
11 Covered Position by each Class Member; (ii) mailing the Notice, Claim Forms and Exclusion
12 Forms to Class Members; (iii) tracking returned Claim and Exclusion Forms; (iv) notifying the
13 Parties of timely and untimely claims; (v) calculating the amounts due to each Class Member
14 pursuant to the Settlement; and (vi) notifying the Parties of and resolving any disputes regarding
15 claims by the Class Members.

16
17 4. "Claim Form" shall mean Exhibit "B", the form approved by the Parties
18 and subject to Court approval which each Class Member must submit to recover a portion of the
19 settlement proceeds.

20
21 5. "Class" or "Class Members" shall mean the named Plaintiff, Timothy
22 Franklin, and all persons who work or worked for the Bank in the State of California in the
23 Covered Position during the Covered Period. All Class Members who opted-in to the Fair Labor
24 Standards Act ("FLSA") collective action entitled, *Raquib Abdullah et al, v. Bank of America,*
25 *N.A.*, Minnesota District Court, Case No. 04-2951 JMR/FLN, and who did not withdraw their
26 consents to opt-in to the *Abdullah* action, are excluded from the provisions of this Settlement.

27
28 6. "Class Representative" shall mean Plaintiff Timothy Franklin.

1 7. "Class Counsel" shall mean James Clapp of Dostart Clapp & Coveney,
2 LLP, Mark Thierman of Thierman Law Firm P.C. and H. Tim Hoffman of Hoffman and Lazear.

3
4 8. "Compensable Work Weeks" shall mean all weeks worked by the Bank's
5 employees in California in the Covered Position during the Covered Period.

6
7 9. "Court" refers to the United States District Court of the Northern District
8 of California.

9
10 10. "Covered Period" shall mean the period December 20, 2000 through the
11 date of preliminary court approval of the Settlement.

12
13 11. "Covered Position" refers to job code SM009, the Mortgage Retail Lending
14 Account Executive Position.

15
16 12. "Exclusion Form" refers to Exhibit "C", the Request for Exclusion Form
17 approved by the Parties and subject to Court approval which a Class Member must submit to
18 exclude themselves from the release of claims pursuant to this Settlement.

19
20 13. "Final Judgment" shall mean the Order Granting Final Approval of Class
21 Action Settlement and Judgment entered by the Court.

22
23 14. "Maximum Payment" shall mean up to \$9,000,000.00 to be paid by the
24 Bank pursuant to this Settlement.

25
26 15. "Notice" shall mean the Notice of Pendency of Class Action, Proposed
27 Settlement and Hearing Date for Court Approval attached as Exhibit "A." It is the notice
28

1 approved by the Parties and subject to Court approval which the Claims Administrator will mail
2 to each Class Member explaining the terms of the Settlement and the claims process.

3
4 16. "Parties" shall mean the Class Representative, Class Members and the
5 Bank.

6
7 17. "Settlement" shall mean this Joint Stipulation of Settlement and Release.

8
9 18. "Settlement Effective Date" shall mean the first day following the last of
10 the following occurrences:

11
12 (a) The date the time to appeal or seek permission to appeal or seek
13 other judicial review of the entry of a Final Judgment approving the Settlement has expired with
14 no appeal or other judicial review having been taken or sought; or

15
16 (b) If an appeal or other judicial review has been taken or sought, the
17 date the Final Judgment is finally affirmed by an appellate court with no possibility of subsequent
18 appeal or other judicial review therefrom, or the date the appeal(s) or other judicial review
19 therefrom are finally dismissed with no possibility of subsequent appeal or other judicial review.

20
21 **II.**
RECITALS

22
23 19. On December 20, 2004, Plaintiff Timothy Franklin filed the Action on
24 behalf of himself and a purported class of "account executive[s], account executive trainee[s],
25 and/or any similar position[s] . . . responsible for originating home mortgage or personal loans to
26 consumers" seeking back pay for non-payment of overtime wages and minimum wages under the
27 FLSA, the California Labor Code and the California Business and Professions Code. In addition,
28 Plaintiff alleged claims for meal and rest period violations and waiting time penalties under

1 California law. On February 9, 2005, the Bank filed a Notice of Pendency of Other Action or
2 Proceeding, informing the Court of a substantially similar suit pending in the United States
3 District Court in Minnesota. The Minnesota District Court case, *Raquist Abdullah et al. v. Bank*
4 *of America, N.A.*, Case No. 04-2951 JMR/FLN, was filed on June 14, 2004.

5
6 20. Plaintiff believes his Action is meritorious based on alleged violations of
7 California's wage and hour laws and the FLSA, and that his Action is appropriate for class action
8 treatment. The Bank denies any liability or wrongdoing of any kind associated with the claims
9 alleged, and contends that, for any purpose other than settlement, this Action is not appropriate
10 for class or collective action treatment pursuant to Federal Rule of Civil Procedure 23 or 29
11 U.S.C. §216(b) respectively. The Bank further contends that it has complied with the California
12 Labor Code, the Fair Labor Standards Act, the California Business and Professions Code, and the
13 applicable Industrial Welfare Commission Wage Orders.

14
15 21. On August 25, 2005, through a full-day mediation with David Rotman,
16 Esq., the Parties reached an agreement to settle this Action on the terms set forth below.

17
18 22. Counsel for the Bank is authorized by the Bank to take, on its behalf, all
19 appropriate action required or permitted to be taken by the Bank pursuant to this Settlement to
20 effectuate its terms. The Parties agree that the Court shall certify a class solely for the purpose of
21 implementing the terms of this Settlement.

22
23 23. Class Counsel represents that it has conducted a thorough investigation into
24 the facts of this case, and has diligently pursued an investigation of the Class Members' claims
25 against the Bank, including (i) interviewing Class Members and analyzing the results of Class
26 Member interviews; (ii) reviewing relevant documents; (iii) researching the applicable law and
27 the potential defenses. Based on its own independent investigation and evaluation, Class Counsel
28 is of the opinion that the Settlement is fair, reasonable, and adequate and is in the best interest of

1 the Class Members in light of all known facts and circumstances, including the risk of significant
2 delay, and defenses asserted by the Bank. The Bank agrees that the Settlement is fair, reasonable
3 and adequate.

4
5 24. The entry of Final Judgment in this Action shall dismiss with prejudice all
6 claims alleged in Plaintiff's complaint. The Parties agree to cooperate and take all steps
7 necessary and appropriate to obtain preliminary and final approval of this Settlement, to
8 effectuate its terms, and to dismiss this Action with prejudice.

9
10 **III.**
TERMS OF SETTLEMENT

11
12 25. **Maximum Payment:**

13
14 (a) The Maximum Payment under the Settlement, if all Class Members
15 file valid and timely claims, is \$9,000,000.00, including payments to Class Members; employee
16 tax withholdings, excluding the employer portion of those withholdings; any enhancement paid to
17 the Class Representative; attorneys' fees, costs and expenses of Class Counsel incurred to date, as
18 well as all such fees and costs incurred in documenting the Settlement, securing trial and
19 appellate court approval of the Settlement, administering the Settlement, and obtaining a
20 dismissal of the Action; and all costs of administration.

21
22 (b) This Settlement does not establish a fund for the payment of claims.
23 The Parties will apply the formula that they develop for allocating the portion of the Maximum
24 Payment that they designate for payments to Class Members in a manner that results in the
25 complete distribution of that portion, assuming that all Class Members participate in the
26 distribution. If fewer than all Class Members participate in the distribution, the residual shall be
27 the exclusive property of the Bank.
28

1 (c) The Bank has represented that the number of Compensable Work
2 Weeks between December 20, 2000 and March 31, 2005 is equal to 83,908 ("Represented
3 Compensable Work Weeks"). If the actual number of Compensable Work Weeks ("Actual
4 Compensable Work Weeks") for such time frame is greater than the Represented Compensable
5 Work Weeks by more than twenty percent (20%), then the Maximum Payment will be increased
6 as follows: The "Ratio of Increased Work Weeks" shall be defined, in percentage terms, as (i) the
7 difference between (x) Actual Compensable Work Weeks and (y) Represented Compensable
8 Work Weeks divided by (ii) Represented Compensable Work Weeks. If the Ratio of Increased
9 Work Weeks is greater than or equal to 20%, then the Maximum Payment will be increased by
10 the Ratio of Increased Work Weeks.

11
12 26. Attorneys' Fees: The Bank agrees, subject to the approval of the Court, to
13 pay to Class Counsel twenty-five percent (25%) of the Maximum Payments (or \$2,250,000.00) in
14 attorneys' fees to compensate Class Counsel for all of the work already performed in this case
15 and all work remaining to be performed in documenting the Settlement, securing Court approval
16 of the Settlement, administering the Settlement, ensuring that the Settlement is fairly
17 administered and implemented and obtaining dismissal of the Action.

18
19 27. Costs: Subject to Court approval, the Bank further agrees to pay Class
20 Counsel \$50,000.00 for costs and expenses incurred by Class Counsel in prosecuting the Action
21 and in implementing the terms of this Settlement. The Bank will issue Class Counsel an IRS
22 Form 1099 for their attorneys' fees and costs.

23
24 28. Enhancement to Class Representative: Conditioned upon the Class
25 Representative's execution of a general release in favor of the Bank, the Bank agrees to pay to the
26 Class Representative, Timothy Franklin, a service payment of \$20,000.00 as an enhancement for
27 his service as a Class Representative, in addition to any payment he may otherwise receive as a
28 Class Member. The Bank will issue an IRS Form 1099 for this service payment.

1 29. Distribution to Class Members:

2
3 (a) The Bank agrees to pay only those Class Members who submit
4 timely and valid Claim Forms. To be timely, the Claim Forms must be postmarked by the date
5 indicated on the Claim Form. To be valid, Claim Forms must be completed in full, signed under
6 penalty of perjury, and accompanied by a photocopy of the driver's license of the claimant or
7 other form of government issued picture identification (e.g., passport).

8
9 (b) After deductions of \$2,300,000 for attorneys' fees and costs and
10 \$20,000 for the service payment to the Class Representative, the remainder of the Maximum
11 Payment shall be \$6,680,000 (such amount, the "Class Member Distribution Amount"). The
12 "Dollars per Compensable Work Week" will be calculated by dividing the total Compensable
13 Work Weeks into the Class Member Distribution Amount.

14
15 (c) Class Member Distribution Amount: The gross amount distributed
16 to each Class Member will be based on the number of weeks worked in the Covered Position
17 during the Covered Period multiplied by the Dollars per Compensable Work Week.

18
19 (d) Tax Allocation: The Parties agree that the settlement payments to
20 Class Members are fifty-percent (50%) wages subject to the withholding of all applicable local,
21 state and federal taxes and fifty-percent (50%) penalties and interest. The Bank will pay its
22 portion of payroll taxes and withholdings.

23
24 (e) Settlement Payment Date: The Bank shall mail the settlement
25 payments to the Class Members as well as the enhancement to the Class Representative within
26 twenty (20) calendar days following the Settlement Effective Date. The Bank shall mail the
27 payment for attorneys' fees and costs within five (5) calendar days following the Settlement
28 Effective Date.

IV.
NOTICE TO THE PLAINTIFF CLASS

30. A Notice in the form attached as Exhibit "A" and approved by the Court shall be sent by the Claims Administrator to the Class Members, by first class mail, within forty-five (45) days of the Court's entry of the Order Granting Preliminary Approval of the Settlement and Notice. Attached to the Notice will be a Claim Form and a Request for Exclusion Form, in the form attached as Exhibits "B" and "C."

31. The Bank shall provide, within four weeks following the Court's entry of the Order Granting Preliminary Approval of the Settlement and Notice, to the Claims Administrator a database of all putative Class Members, including last known addresses and telephone numbers, dates of employment in the Covered Position for the Covered Period, and social security numbers. This database shall be based on the Bank's payroll and other business records and in a format acceptable to the Claims Administrator. The Bank agrees to consult with the Claims Administrator prior to the production date to ensure that the format of the database will be acceptable to the Claims Administrator. In consideration of the privacy concerns of the individual Class Members, the Claims Administrator will not share the identity of individual Class Members with the Class Representative or Class Counsel. If, however, a Class Member requests the opportunity to communicate with Class Counsel, the Claims Administrator shall contact Class Counsel and furnish them with that Class Member's contact information.

32. The Claims Administrator will use all standard skip tracing devices to obtain forwarding addresses and forward return mail to ensure that the Notice, the Claim Form and instructions, and the Exclusion Form are sent to all Class Members. It will be conclusively presumed that if an envelope so mailed has not been returned within thirty (30) days of the mailing that the Class Member received the Notice. With respect to returned envelopes, the

1 Claims Administrator will use reasonable diligence to obtain a current address and re-mail the
2 envelope to such address within ten (10) days of the receipt of the returned envelope.

3
4 33. The Claims Administrator will mail a reminder postcard no later than ten
5 (10) days before the deadline to submit Claim Forms.

6
7 34. Class Counsel shall provide the Court, at least five (5) days prior to the
8 final fairness hearing, a declaration by the Claims Administrator specifying the due diligence it
9 has undertaken with regard to the mailing of the Notice.

10
11 **V.**
12 **CLAIM PROCESS**

13 35. Within forty-five (45) days following the Court's entry of the Order
14 Granting Preliminary Approval of the Settlement and Notice, the Claims Administrator will mail
15 to all Class Members the Notice, the Claim Form and instructions, and the Request for Exclusion
16 Form.

17
18 36. Each Claim Form will list the number of weeks during the Covered Period
19 that the Class Member held the Covered Position according to the Bank's records. The Claim
20 Form will contain a request that the Class Member confirm or dispute this information.

21
22 37. Class Members will have sixty (60) days from the mailing of the Notice,
23 Claim Forms and Exclusion Forms to submit their Claim Form or Exclusion Form. No Claim
24 Forms or Exclusion Forms will be honored if postmarked after the deadline to submit claims. All
25 original Claim Forms and Exclusion Forms shall be sent directly to the Claims Administrator at
26 the address indicated on the forms.

1 38. The Claims Administrator will certify jointly to Class Counsel and the
2 Bank's counsel which Claim Forms and Exclusion Forms were timely or untimely filed.

3
4 39. The Claims Administrator shall report, in summary or narrative form, the
5 substance of any discrepancies between the dates of employment submitted by the Class Member
6 on the Claim Form and the Bank's records. The Claims Administrator shall be granted
7 reasonable access to the Bank's records in order to perform its duties, but shall not turn over such
8 records to the Class Representative or Class Counsel absent consent of the Bank's counsel. The
9 Claims Administrator's determination regarding the discrepancy will be final.

10
11 40. The Claims Administrator will submit a list of timely, non-fraudulent
12 claims and the calculation of the amounts due to each Class Member pursuant to this Settlement.

13
14 41. The Claims Administrator will timely notify claimants whose claims are
15 untimely or denied for other reasons, e.g., the claimant is not a member of the Class because the
16 claimant did not hold the Covered Position during the Covered Period.

17
18 42. The Bank shall be responsible for issuing the payments and calculating and
19 withholding all required state and federal taxes. The Bank will file proof of payment with the
20 Court and will serve Class Counsel with a copy.

21
22 **VL**
23 **RELEASE OF CLAIMS**

24 43. Released Claims by Class Members. The Class Members (other than those
25 who file Exclusion Forms) hereby fully and finally release and discharge the Bank and their
26 former and present parent, subsidiary, and affiliated corporations and their officers, directors,
27 employees, partners, shareholders and agents, and any other successors, assigns, or legal
28 representatives ("Class Members' Released Parties), from any and all wage-and-hour claims,

1 whether known or unknown, arising during the period from December 20, 2000 to December 31,
2 2005 ("Class Members' Released Period"), whether under federal, state and/or local law, statute,
3 ordinance, regulation, common law, or other source of law; whether or not such claims are in the
4 nature of claims for damages, unpaid wages, premium pay, waiting-time penalties, or other
5 penalties for overtime, missed meal periods, missed rest breaks, and other alleged wage-and-hour
6 violations, attorneys' fees or injunctive relief; whether sounding in contract or tort; and whether
7 pursuant to a statutory remedy ("Class Member's Released Claims"). The Class Member's
8 Released Claims include, but are not limited to, claims arising from or dependent on the
9 California Labor Code; the wage orders of the California Industrial Welfare Commission;
10 California Business and Professions Code section 17200 *et seq.*; the California common law of
11 contract and tort; and the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*

12
13 44. Released Claims by the Class Representative. The Class Representative
14 hereby fully and finally releases and discharges the Bank and their former and present parent,
15 subsidiary, and affiliated corporations and their officers, directors, employees, partners,
16 shareholders and agents, and any other successors, assigns, or legal representatives ("Class
17 Representative's Released Parties"), from any and all claims, whether known or unknown, arising
18 during the period from the start of time to December 31, 2005 ("Class Representative's Released
19 Period"), whether under federal, state and/or local law, statute, ordinance, regulation, common
20 law, or other source of law; whether or not such claims are in the nature of claims for damages,
21 unpaid wages, premium pay, waiting-time penalties, or other penalties for overtime, missed meal
22 periods, missed rest breaks, and other alleged wage-and-hour violations, attorneys' fees or
23 injunctive relief; whether sounding in contract or tort; and whether pursuant to a statutory remedy
24 ("Class Representative's Released Claims"). The Class Representative's Released Claims
25 include, but are not limited to, claims arising from or dependent on the California Labor Code;
26 the wage orders of the California Industrial Welfare Commission; California Business and
27 Professions Code section 17200 *et seq.*; the California Fair Employment and Housing Act, Cal.
28 Gov't Code § 12900 *et seq.*; the California common law of contract and tort; Title VII of the Civil

1 Rights Act of 1964; the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*; the
2 Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*; and the Fair Labor
3 Standards Act, 29 U.S.C. § 201 *et seq.*

4
5 45. Waiver of California Civil Code Section 1542. It is the desire of the
6 Parties to fully, finally, and forever settle, compromise, and discharge disputes and claims
7 asserted in this Action against the Bank whether known or unknown, liquidated or unliquidated.
8 Each Class Member and the Class Representative waives, as to the Released Claims, all rights
9 and benefits afforded by Section 1542 of the Civil Code of the State of California ("Section
10 1542"), and does so understanding the significance of that waiver. Section 1542 provides: "A
11 general release does not extend to claims which the creditor does not know or suspect to exist in
12 his or her favor at the time of executing the release, which if known by him must have materially
13 affected his or her settlement with the debtor."

14
15 **VII.**
DUTIES OF THE PARTIES PRIOR TO COURT APPROVAL

16
17 46. The Parties shall promptly submit this Settlement to the Court in support of
18 Plaintiffs' Motion for Preliminary Approval and determination by the Court as to its fairness,
19 adequacy, and reasonableness. Promptly upon execution of this Settlement, the Parties shall
20 apply to the Court for the entry of an Order Granting Preliminary Approval of the Settlement and
21 Notice substantially in the following form:

- 22
23 (a) Scheduling a fairness hearing on the question of whether the
24 proposed Settlement should be finally approved as fair, reasonable and adequate as to the Class;
25 (b) Approving as to form and content the proposed Notice;
26 (c) Approving as to form and content the proposed Claim Form and
27 instructions for Bank employees in the Covered Position;
28 (d) Approving as to form and content the proposed Exclusion Form;

- 1 (e) Directing the mailing of the Notice, the Claim Form and the
2 Exclusion Form by first class mail to the Class Members;
3 (f) Preliminarily approving the Settlement;
4 (g) Preliminarily certifying the Class for purposes of Settlement; and
5 (h) Approving Dostart Clapp & Coveney, LLP, Hoffman & Lazear,
6 and the Thierman Law Firm, PC as Class Counsel, Timothy Franklin as Class Representative and
7 a Claims Administrator.

8
9 **VIII.**
DUTIES OF THE PARTIES FOLLOWING FINAL COURT APPROVAL

10
11 47. Following final approval by the Court of the Settlement, Class Counsel will
12 submit a proposed Final Judgment:

- 13
14 (a) Approving the Settlement, adjudging the terms thereof to be fair,
15 reasonable and adequate, and directing consummation of its terms and provisions;
16 (b) Approving Class Counsel's application for an award of attorneys'
17 fees and reimbursement of costs;
18 (c) Approving the Class Representative's service payment;
19 (d) Certifying the Class for Settlement purposes; and
20 (e) Dismissing this Action on the merits and with prejudice and
21 permanently barring all Class Members (other than those who timely filed Exclusion Forms) from
22 prosecuting against the Class Members' Released Parties any and all Class Members' Released
23 Claims arising during the Class Members' Released Period.

24
25 **IX.**
VOIDING THE AGREEMENT

26
27 48. If this Settlement is not approved, the Settlement shall not be used nor be
28 admissible in any subsequent proceedings either in this Court or in any other Court or forum. If

1 there is any reduction in the attorneys' fee award, such reduction may be appealed as set forth
2 below but is not a basis for rendering the entire Settlement voidable and unenforceable.

3
4 **X.**
PARTIES' AUTHORITY

5
6 49. The respective signatories to the Settlement represent that they are fully
7 authorized to enter into this Settlement and bind the respective Parties to its terms and conditions.

8
9 **XI.**
MUTUAL FULL COOPERATION

10
11 50. The Parties agree to fully cooperate with each other to accomplish the
12 terms of this Settlement, including but not limited to, execution of such documents and to take
13 such other action as may reasonably be necessary to implement the terms of this Settlement. The
14 Parties shall use their best efforts, including all efforts contemplated by this Settlement and any
15 other efforts that may become necessary by order of the Court, or otherwise, to effectuate the
16 terms of this Settlement. As soon as practicable after execution of this Settlement, Class Counsel
17 shall, with the assistance and cooperation of the Bank and their counsel, take all necessary steps
18 to secure the Court's Final Judgment.

19
20 51. The Bank agrees that it will not attempt to discourage Class Members from
21 filing Claim Forms.

22
23 **XII.**
NO PRIOR ASSIGNMENTS

24
25 52. The Parties represent, covenant, and warrant that they have not directly or
26 indirectly, assigned, transferred, encumbered, or purported to assign, transfer, or encumber to any
27 person or entity any portion of any liability, claim, demand, action, cause of action or right
28 released and discharged in this Settlement.

XIII.
NO ADMISSION

53. Nothing contained in this Settlement is to be construed or deemed an admission of liability, culpability, negligence, or wrongdoing on the part of the Bank, and the Bank denies liability therefor. Each of the Parties has entered into this Settlement with the intention to avoid further disputes and litigation with the attendant inconvenience and expenses. This Settlement is a settlement document and shall be inadmissible in evidence in any proceeding, except an action or proceeding to approve, interpret, or enforce its terms.

XIV.
ENFORCEMENT ACTIONS

54. In the event that one or more of the Parties institutes any legal action, arbitration, or other proceeding against any other party or parties to enforce the provisions of this Settlement or to declare rights and/or obligations under this Settlement, the successful party or parties shall be entitled to recover from the unsuccessful party or parties reasonable attorneys' fees and costs, including expert witness fees incurred in connection with any enforcement actions.

XV.
NOTICES

55. Unless otherwise specifically provided herein, all notices, demands or other communications given hereunder shall be in writing and shall be deemed to have been duly given as of the third business day after mailing by United States registered or certified mail, return receipt requested, addressed as follows:

(a) To the Class:

Mark Thierman, Esq.

Thierman Law Firm, PC

1 7287 Lakeside Drive

2 Reno, Nevada 89511

3 (b) To the Bank:

4 Annette Rittmuller, Esq.

5 Paul, Hastings, Janofsky & Walker LLP

6 55 Second Street, 24th Floor

7 San Francisco, California 94105

8
9 **XVI.**
CONSTRUCTION

10
11 56. The Parties agree that the terms and conditions of this Settlement are the
12 result of lengthy, intensive arms-length negotiations between the Parties and that this Settlement
13 shall not be construed in favor of or against any party by reason of the extent to which any party
14 or her or its counsel participated in the drafting of this Settlement.

15
16 **XVII.**
CAPTIONS AND INTERPRETATIONS

17
18 57. Paragraph titles or captions contained herein are inserted as a matter of
19 convenience and for reference, and in no way define, limit, extend, or describe the scope of this
20 Settlement or any provision. Each term of this Settlement is contractual and not merely a recital.

21
22 **XVIII.**
MODIFICATION

23
24 58. This Settlement may not be changed, altered, or modified, except in writing
25 and signed by the Parties, and approved by the Court. This Settlement may not be discharged
26 except by performance in accordance with its terms or by a writing signed by the Parties.

XIX.
INTEGRATION CLAUSE

59. This Settlement contains the entire agreement between the Parties relating to the resolution of the Action, and all prior or contemporaneous agreements (except the Settlement Agreement and General Release between the Bank and the Class Representative), understandings, representations, and statements, whether oral or written and whether by a party or such party's legal counsel, are merged in this Settlement. No rights under this Settlement may be waived except in writing.

XX.
BINDING ON ASSIGNS

60. This Settlement shall be binding upon and inure to the benefit of the Parties and their respective heirs, trustees, executors, administrators, successors and assigns.

XXI.
CLASS COUNSEL SIGNATORIES

61. It is agreed that because the members of the Class are so numerous, it is impossible or impractical to have each Class Member execute this Settlement. The Notice, Exhibit "___", will advise all Class Members of the binding nature of the release. Excepting only the Class Members who timely submit an Exclusion Form, the Notice shall have the same force and effect as if this Settlement were executed by each Class Member.

XXII.
COUNTERPARTS

62. This Settlement may be executed in counterparts, and when each party has signed and delivered at least one such counterpart, each counterpart shall be deemed an original, and, when taken together with other signed counterparts, shall constitute one Settlement, which shall be binding upon and effective as to all Parties.

1 **XXIII.**
2 **CONFIDENTIALITY PRECEDING PRELIMINARY APPROVAL**

3 63. The Parties and their counsel agree that they will not issue any press
4 releases or have any communication with the press or anyone else regarding the Settlement
5 except as set forth in Section XXIV. If Plaintiff or his attorneys disclose to any non-party any of
6 the terms of the Settlement, before the Settlement is approved by the court exercising jurisdiction
7 over this matter, the Bank may withdraw from the Settlement, rendering any agreement made in
8 connection with the Settlement void and unenforceable.
9

10 **XXIV.**
11 **PUBLIC COMMENT**

12 64. The Parties and their counsel agree that neither the Parties nor their counsel
13 will issue any press releases or have any communications with the media other than a mutually
14 agreed-upon statement made in response to an inquiry from the press.
15

16 **XXV.**
17 **RIGHT OF APPEAL**

18 65. The Parties agree to waive appeals with the sole exception that Plaintiffs
19 can appeal a reduction, if any, in the attorneys' fees amount.
20

21 **XXVI.**
22 **CLASS CERTIFICATION**

23 66. The Parties agree that the stipulation of Class Certification is for settlement
24 purposes only and if for any reason, the settlement is not approved, the Stipulation will be of no
25 force or effect. The Parties agree that certification for settlement purposes is in no way an
26 admission that class certification is proper and that evidence of this stipulation for settlement
27 purposes only will not be deemed admissible in this or any other proceeding.
28

1 **XXVII.**
2 **NO SETTLEMENT FUND**

3 67. The Parties agree that California Code of Civil Procedure Section 384 is
4 not applicable. The Parties represent that the Maximum Payment is a settlement amount that
5 takes into account the probability that many Class Members for various reasons will not file
6 claims. The Parties recognize that the settlement amount would have been substantially less if all
7 of it had to be paid. No fund has been created. No obligation to pay Class Members is created
8 until a valid Claim Form is filed. There is thus no residue. Neither Plaintiffs nor their counsel
9 shall take, or cause any other person to take, a position before the Court that California Code of
10 Civil Procedure Section 384 applies to this Settlement. The Parties will work together
11 expeditiously to obtain preliminary and final approval of this Settlement.
12

13 **XXVIII.**
14 **RIGHT OF REVOCATION**

15 68. If more than 5% of the Class Members timely submit Exclusion
16 Forms, the Bank has the exclusive right to void this Settlement. The Bank shall make its
17
18
19
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27
28

1 election prior to Final Judgment. If the Settlement is not approved or is voided, neither
2 the Class Representative nor Class Counsel shall be liable for any costs of administration.

3
4
5 DATED: September 15, 2005

PAUL, HASTINGS, JANOFSKY & WALKER LLP

6
7 By: 

ANNETTE M. RITTMULLER

8 Attorneys for Defendant
9 Bank of America, N.A.

10 DATED: September ____, 2005

BANK OF AMERICA, N.A.

11
12 By: _____

ANNE KINNANE

13 Who is authorized to execute on behalf of Bank of
14 America, N.A.

15 DATED: September ____, 2005

HOFFMAN & LAZEAR

16
17 By: _____

ARTHUR W. LAZEAR

Attorneys for Plaintiffs

18 DATED: September ____, 2005

REPRESENTATIVE PLAINTIFF

19
20 By: _____

TIMOTHY L. FRANKLIN

Representative Plaintiff

21
22 SF/377552.6

1 election prior to Final Judgment. If the Settlement is not approved or is voided, neither
2 the Class Representative nor Class Counsel shall be liable for any costs of administration.

3
4 DATED: September ____, 2005 PAUL, HASTINGS, JANOFSKY & WALKER LLP

5
6 By: _____
7 ANNETTE M. RITTMULLER

8 Attorneys for Defendant
9 Bank of America, N.A.

10 DATED: September 15, 2005 BANK OF AMERICA, N.A.

11 By: Anne Kinnane
12 ANNE KINNANE
13 Who is authorized to execute on behalf of Bank of
14 America, N.A.

15 DATED: September ____, 2005 HOFFMAN & LAZEAR

16 By: _____
17 ARTHUR W. LAZEAR
18 Attorneys for Plaintiffs

19 DATED: September ____, 2005 REPRESENTATIVE PLAINTIFF

20 By: _____
21 TIMOTHY L. FRANKLIN
22 Representative Plaintiff

23 BF/377552.6
24
25
26
27
28

1 election prior to Final Judgment. If the Settlement is not approved or is voided, neither
2 the Class Representative nor Class Counsel shall be liable for any costs of administration.

3
4
5 DATED: September ____, 2005 PAUL, HASTINGS, JANOFSKY & WALKER LLP

6
7 By: _____
8 ANNETTE M. RITTMULLER

9 Attorneys for Defendant
10 Bank of America, N.A.

11 DATED: September ____, 2005 BANK OF AMERICA, N.A.

12 By: _____
13 ANNE KINNANE
14 Who is authorized to execute on behalf of Bank of
15 America, N.A.

16 DATED: September 15, 2005 HOFFMAN & LAZEAR

17 By: _____
18 ARTHUR W. LAZEAR
19 Attorneys for Plaintiffs

20 DATED: September ____, 2005 REPRESENTATIVE PLAINTIFF

21 By: _____
22 TIMOTHY L. FRANKLIN
23 Representative Plaintiff

24 SF/377552.6

1 election prior to Final Judgment. If the Settlement is not approved or is voided, neither
2 the Class Representative nor Class Counsel shall be liable for any costs of administration.

3
4
5 DATED: September ____, 2005 PAUL, HASTINGS, JANOSKY & WALKER LLP

6
7 By: _____
ANNETTE M. RITTMULLER

8 Attorneys for Defendant
9 Bank of America, N.A.

10 DATED: September ____, 2005 BANK OF AMERICA, N.A.

11
12 By: _____
ANNE KINNANE
13 Who is authorized to execute on behalf of Bank of
America, N.A.

14 DATED: September ____, 2005 HOFFMAN & LAZEAR

15
16 By: _____
ARTHUR W. LAZEAR
17 Attorneys for Plaintiffs

18 DATED: September 15, 2005 REPRESENTATIVE PLAINTIFF

19
20 By: Timothy L. Franklin
21 TIMOTHY L. FRANKLIN
22 Representative Plaintiff

23 SFA77552.6
24
25
26
27
28